

Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1451

GLADYS E. ROGERS and MARGARET A. ROGERS,
as Co-executrixes of the Estate of DILWORTH T. ROGERS,
Petitioners,

v.

EXXON RESEARCH AND ENGINEERING CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the District Court for the District of New Jersey is reported at 404 F.Supp. 324. The opinion of the Court of Appeals for the Third Circuit is reported at 550 F.2d 834.

Counter-Statement of Questions Presented

The matter having been remanded for a new trial and completion of the record, should this Court review and decide prior thereto the following questions?

1. Whether Dr. Rogers' disability retirement was lawful under the Age Discrimination in Employment Act of 1967 (ADEA), particularly 29 U.S.C. §623(f)(2), which provides that it is not unlawful for an employer to observe the terms of a bona fide retirement plan which is not a subterfuge to evade the purposes of the ADEA.

2. Whether damages for "pain and suffering" are allowable under the ADEA.

Counter-Statement of the Case

The material facts are essentially as stated in the opinion of the Court of Appeals (Petition at p. 34a-36a), and Respondent respectfully adopts them by reference.

Respondent cannot agree with Petitioners' Statement of the Case. They in large part speculate as to the factual basis for the jury verdict. During the thirteen-day trial, many factual issues arose. However, no questions or interrogatories were submitted to the jury to elicit findings of fact, and the verdict was accordingly a general verdict of liability, rendered without elaboration.

In their version of the testimony at trial, Petitioners have marshalled selected portions and drawn unwarranted inferences. Evidentiary matters, the credibility of witnesses and reliability of certain evidence presented major issues at trial and on appeal; and in remanding the case for retrial, the Third Circuit expressed reservations re-

specting the relevancy of certain of the evidence introduced by plaintiffs.

Defendant contended that Dr. Rogers' retirement was pursuant to the disability provisions of a bona fide retirement plan which was not a subterfuge to evade the purposes of the ADEA, and that it was therefore lawful under 29 U.S.C. §623(f)(2). The bona fides of the plan was stipulated at trial.

Plaintiffs contended, and the trial court agreed, that notwithstanding the exception provided by §623(f)(2), the Act bans involuntary retirement prior to age 65 even under an otherwise bona fide plan, if age played any part in the decision. Because of plaintiffs' objection the EREC retirement plan was not received in evidence.

Reasons for Denying the Writ

1. The judgment is interlocutory, and there are no extraordinary circumstances warranting review by this Court.

In vacating the judgment below because of the District Court's error in construing §623(f)(2), the statutory exemption regarding bona fide retirement plans, the Third Circuit relied exclusively upon its holding in *Zinger v. Blanchette*, 549 F.2d 901 (3d Cir. 1977), *petition for cert. filed*, April 7, 1977, No. 76-1375.¹ Nonetheless, it declined to enter judgment for defendant and remanded to the District Court for completion of the record, noting that because of plaintiffs' objections the EREC retirement plan was not received in evidence. Since the plan is not in the

¹ The rationale of the Third Circuit in construing the exception for retirement pursuant to a bona fide plan is set forth at length in *Zinger*. In *Rogers* it is referred to only by reference to *Zinger*.

record and the case was remanded for retrial, the issue of the bona fide plan exemption is necessarily presented here in the abstract. Thus, not only is the judgment interlocutory, but the record is materially incomplete on the precise issue this Court is asked to review.

While Respondent is fully aware that this Court has the power to issue a writ of certiorari notwithstanding the judgment is not final, it has long expressed the view that this is a power "not ordinarily to be exercised." *The Three Friends*, 166 U.S. 1, 49 (1897); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R.R. Co.*, 389 U.S. 327 (1967).

In *American Construction Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893), the Court considered the circumstances under which certiorari should be granted to review interlocutory orders and concluded:

Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

Petitioners do not, nor could they in good candor, contend that extraordinary inconvenience and embarrassment will occur in the further proceedings mandated by the Third Circuit. Under the circumstances, we respectfully urge that for this reason alone the writ should be denied.

2. The petition seeks review on an incomplete record of an issue not presented below, in a medical disability case in which there is no conflict among the Circuits.

Petitioners have misconstrued the opinion below and in doing so have raised a new issue. They now state the question for review to be: "[W]hether the employer has taken actions which preclude its reliance on its retirement plan." Petition p. 14. This question was never raised before the District Court or on appeal to the Third Circuit. With regard to the statutory exemption, the dispute below was solely whether it permitted the disability retirement. On this issue Petitioners have at all times contended that so long as age plays any part in the decision, the Act bans involuntary retirement notwithstanding the exemption 550 F.2d at 838.

Petitioners predicate this new issue on an erroneous construction of the opinion below. The Third Circuit did not, as Petitioners contend at p. 14 of their Petition, hold or imply that an employer could lawfully adopt an age discrimination policy and use it to harass or mistreat older employees prior to retirement. To the contrary, it held that Petitioners' claims of age discrimination prior to Dr. Rogers' retirement, if proved, would constitute arguable violations of the Act. It remanded for retrial with respect to this very issue, since on the jury finding of liability, it could not determine what violations, if any, the jury found to have occurred prior to retirement 550 F.2d at 838.

Only in exceptional cases does this Court consider issues which have not been presented to the Court of Appeals. *Neely v. Eby Construction Co.*, 386 U.S. 317, 330 (1967); *Duignan v. United States*, 274 U.S. 195, 200 (1926). We

submit there is no reason for the Court to deviate from its normal practice in the instant case.

Rogers was retired for medical disability, and his retirement on this basis is still in dispute. In this regard certain documents bearing on the medical disability were destroyed by him, and evidence of that fact was improperly excluded at trial. Also the relevance of much of the other evidence must be re-evaluated. Thus the record is inadequate to provide this Court with a foundation to review the question presented.

Nor is the *Rogers* case in conflict with decisions in other Circuits, as argued by Petitioners. Although respondent contends it could have lawfully retired Rogers pursuant to the age and service provisions of its retirement plan, this case is primarily concerned with a disability retirement. In contrast, *McMann v. United Air Lines, Inc.*, 542 F.2d 217, 222 (4th Cir. 1976), cert. granted, February 20, 1977, No. 76-906; *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974); and *Zinger, supra*, are concerned with involuntary early retirement based solely on age. Disability retirements occur without regard to age.

No conflict exists with *McMann, supra*, which held that retirement under a bona fide plan prior to age 65 must be justified by some legitimate reason other than age. Here that reason would be disability. Nor is there a conflict with *Brennan, supra*, which permitted early retirement pursuant to a bona fide pension plan, even where age was a factor.

3. The issue whether damages may be awarded for "pain and suffering" under the ADEA is not a question meriting review by this Court.

Petitioners, in asking this Court to review the holding of the Third Circuit herein that "pain and suffering" damages are not awardable under the ADEA, contend the question is frequently raised and requires this Court's guidance. Petition at p. 19. There is no conflict among the Circuits with respect to this issue, nor is there any real conflict at the District Court level. Without exception, the District Court cases cited by Petitioners which allowed damages for "pain and suffering" have relied on the District Court opinion in *Rogers* before it was reversed.² The only cases we have found which discuss the issue subsequent to the decision of the Third Circuit in *Rogers* concur with the result therein and note that the contrary views expressed in cases prior thereto were premised on the discredited District Court opinion herein. *Looney v. Commercial Union Assurance Companies*, Civil No. 6-70207, U.S.D.C., E.D. Mich., S.D., slip opinion, March 9, 1977. *Crispen v. Southern Cross Industries, Inc.*, Civil No. 75-1820A, U.S.D.C., N.D. Ga., Atlanta Div., slip opinion, March 23, 1977.

Respondent submits, moreover, that the Third Circuit reached the correct result in precluding recovery under the ADEA for "pain and suffering." As noted by that Court, the primary and initial enforcement method contemplated by Congress is conciliation and mediation. 550 F.2d at 841 and n.11. Permitting "pain and suffering"

² In *Platt v. Burroughs Corp.*, 424 F.Supp. 1329 (E.D. Pa. 1976), and *Sant v. Mack Trucks, Inc.*, 424 F.Supp. 621 (N.D. Cal. 1976), the courts declined to follow the District Court opinion in *Rogers* and refused to allow damages for "pain and suffering."

awards in subsequent private litigation, after failure of conciliation, can only serve to thwart the conciliation process. Additionally, the careful review of legislative history undertaken by the Third Circuit demonstrates that Congress, while aware of emotional problems related to age discrimination, nevertheless carefully delineated a comprehensive enforcement procedure. While it specifically provided for double damages in case of willful wrongdoing, it made no provision for the unusual remedy of damages for "pain and suffering." Respondent submits that in view of the careful, comprehensive and persuasive analysis of the issue by the Third Circuit and because there are no special and important reasons for review, the issue does not merit review by this Court.

CONCLUSION

For the reasons stated, Respondent submits that the Petition for a Writ of Certiorari to the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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DATED: May 20, 1977.